

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DELAWARE RIVERKEEPER NETWORK
and MAYA K. VAN ROSSUM, the
DELAWARE RIVERKEEPER,

No. 1:21-cv-01108-NLH-AMD

OPINION

Plaintiffs,

v.

DELAWARE RIVER BASIN
COMMISSION and DELAWARE RIVER
PARTNERS LLC,

Defendants.

APPEARANCES:

KACY CUMMINGS MANAHAN
DELAWARE RIVERKEEPER NETWORK
925 CANAL ST
SUITE 3701
BRISTOL, PA 19007

On behalf of Plaintiffs.

KATHLEEN B. CAMPBELL
MICHAEL DILLON
DAVID ROBERT STRUWE
MANKO GOLD KATCHER & FOX LLP
401 CITY AVENUE
SUITE 901
BALA CYNWYD, PA 19004

PAUL M. HAUGE
GIBBONS. PC
ONE GATEWAY CENTER
NEWARK, NJ 07102-5310

On behalf of Delaware River Partners LLC.

JOHN S STAPLETON
PETER A. MUHIC
LEVAN MUHIC STAPLETON LLC
FOUR GREENTREE CENTRE
601 RT 73 N
SUITE 303
MARLTON, NJ 08053

On behalf of the Delaware River Basin Commission.

HILLMAN, District Judge

Before the Court is Delaware Riverkeeper Network's ("DRN") and Maya K. Van Rossum's (together, "Plaintiffs") motion to correct the administrative record. (ECF 19). For the reasons expressed below, the motion will be denied.

BACKGROUND

The instant matter before the Court arises out of a dispute over a Delaware River Partners LLC ("DRP") development site in Gloucester County, New Jersey. (ECF 1 at 11). The crux of the dispute is a new project at the site, the "Dock 2 Project, a new marine Terminal" whose construction would involve "mechanical dredging in the Delaware River." (*Id.*) Under the rules founded in the Delaware River Basin Compact (the "Compact")¹, which created the Delaware River Basin Commission (the "Commission")

¹ The Compact is a covenant entered into in 1961 by Delaware, New Jersey, New York, the Commonwealth of Pennsylvania and the federal government regarding the management of the water and related resources of the Delaware River Basin. (See Compact, available at <https://www.state.nj.us/drbc/library/documents/compact.pdf>). (last visited Nov. 29, 2021).

to oversee the management of the Delaware River Basin, DRP submitted an application for its project to the Commission in early 2019. (Id. at 13). The Commission allowed for a notice and comment period, during which time DRN submitted comment letters opposing the project. (Id.) The Commission approved the project on June 12, 2019 and DRN then filed a request for a hearing to review the Commission's decision which the Commission granted in September 2019. (Id. at 13-14). Prior to the hearing, which was held virtually in May 2020, the Commission allowed for another period of public comment. (Id. at 14-15). In July 2020, the hearing officer assigned to the case recommended that the project should remain as previously approved. (Id. at 15). Thereafter, the parties were allowed to submit post-hearing briefing for a period of time which concluded on August 31, 2020. (ECF 23 at 8). Thereafter, the Commissioners reviewed the administrative record and the hearing officer's recommendation and on December 9, 2020 affirmed its June 12, 2019 determination. (ECF 1 at 15).

After post-hearing briefing had concluded but before the Commission affirmed its decision, DRN and other entities submitted numerous documents to the Commission, presumably for consideration in rendering its final decision. (ECF 19-2 at 10-11). Plaintiffs appealed that decision to this Court on January 25, 2021. (ECF 1). In their joint discovery plan for this

case, the parties acknowledged that the case would be decided solely on the administrative record and not on the basis of other discovery. (See ECF 13). The Commission then filed an administrative record that did not include those submissions. (See id.) Thereafter, Plaintiffs filed the instant motion to complete the administrative record, contending that those excluded submissions are properly considered part of the administrative record and must be included for this Court's review. Both DRN and the Commission oppose the motion (ECF 23, 24). It is against this backdrop that the Court will commence its analysis.

DISCUSSION

At the outset, the Court notes that the standard to be applied in reviewing Plaintiff's appeal as well as this instant motion to amend or correct the administrative record has not been laid out clearly in precedent. Unlike many appeals of administrative orders, appeals of decisions issued by the Delaware River Commission are not governed by the Administrative Procedure Act (the "APA") but rather the Compact. Compact at § 15.1(m); Wayne Land & Min. Grp. LLC v. Delaware River Basin Comm'n, 894 F.3d 509, 525 (3d Cir. 2018) ("By its terms, however, the Compact is not subject to the APA."). The Compact and the regulations surrounding it make clear, though, that a decision by the Commission is subject to review by a court.

Compact at § 3.8 ("Any determination of the commission hereunder shall be subject to judicial review in any court of competent jurisdiction."); 18 C.F.R. § 401.90 ("Any party participating in a hearing conducted pursuant to the provisions of this subpart may appeal any final Commission action.")

Beyond this, though, neither the Compact nor the regulations offer guidance regarding the standards of review a court must apply with respect to the disposition of the appeal as a whole or motions such as the instant one to correct the administrative record. That said, the parties in this matter seem to all agree that the standards employed under the APA are instructive. (See ECF 19 (making arguments based on cases decided under the APA); ECF 22 (same); ECF 23 (same)). Further, though not directly confronted with the issue of the proper standard, this Court has noted that other plaintiffs have premised their appeals under standards associated with the APA. Delaware Riverkeeper Network v. Delaware River Basin Comm'n, 2011 WL 3882503, at *2 (D.N.J. Sept. 2, 2011) (referencing the arbitrary and capricious standard, which is a standard under the APA); Delaware Riverkeeper Network v. Collier, 2011 WL 3882506, at *3 (D.N.J. Sept. 2, 2011) (same). Accordingly, in the absence of a contrary standard in the Compact itself, the Court will turn to cases interpreting the APA as instructive, but not binding, authority.

In the instant motion, the Court is not faced with the task of determining whether the Commission made the right decision. It only must decide whether amending the administrative record is appropriate. The Court will look at the contours of the caselaw under the APA for similar motions in order to frame its analysis here. Generally, the court's review of an agency's decision is confined to the administrative record certified by the agency. Tinicum Twp., Pa. v. U.S. Dep't of Transp., 685 F.3d 288, 294 (3d Cir. 2012) ("We confine our review to the administrative record upon which the FAA's Record of Decision was based.") "If an agency certifies that the administrative record is full and complete, the court assumes that the agency properly designated the Administrative Record absent clear evidence to the contrary." Bintz v. Fed. Emergency Mgmt. Agency, 379 F. Supp. 3d 296, 301 (D. Del. 2018) (internal quotation marks omitted); New Jersey v. U.S. Army Corps of Engineers, 2010 WL 2771771, at *3 (D.N.J. July 13, 2010), aff'd sub nom. Delaware Dep't of Nat. Res. & Env't Control v. U.S. Army Corps of Engineers, 685 F.3d 259 (3d Cir. 2012) ("The administrative record is compiled and designated by the agency, and it is entitled to a strong presumption of regularity absent clear evidence of irregularity.") Inquiry into the administrative process by which an agency arrived at a decision is strongly disfavored. NVE, Inc. v. Dep't of Health & Hum.

Servs., 436 F.3d 182, 195 (3d Cir. 2006) ("There is a strong presumption against discovery into administrative proceedings born out of the objective of preserving the integrity and independence of the administrative process.")

However, there are some narrowly tailored carveouts through which a party may attack an administrative record. The principal carveout, not at issue here, is where a party alleges bias on the part of the agency. Id. Another is "where the bare administrative record did not disclose the factors considered by an agency or the agency's construction of the evidence in its record[.]" Horizons Int'l, Inc. v. Baldrige, 811 F.2d 154, 162 (3d Cir. 1987). A party may seek to amend the administrative record where its shows that the record omits "documents and materials directly or indirectly considered by the agency in its decision-making process." U.S. Army Corps of Engineers, 2010 WL 2771771 at *3. To amend the administrative record or to get discovery in an effort to amend the administrative record, a party must make some threshold showing that the record is deficient. Id. at 4.

Plaintiffs have not made any such showing here. Plaintiffs contend that documents submitted to the Commission after August 31, 2020, when the record closed, should be considered because the Commission indirectly relied on them (ECF 19 at 2-3). Specifically, they point to letters that the Commission sent in

response to those submissions as evidence that the Commission at least indirectly considered the submissions. (ECF 19 at 10). These communications, though, simply acknowledged receipt of the submissions and specifically informed Plaintiffs that the administrative record was already closed. (See ECF 19-6 at 2) ("The record on which the Commissioners must make their final determination on the appeal is closed. The extensive record is currently under the Commissioners' review.") The fact that staff at the Commission acknowledged receipt of submissions after the record had closed does not change that calculus when the staff wrote in black and white ink that the record was closed.

Plaintiffs' reliance on the fact that the administrative record included a letter from DRP counsel that was submitted on December 9, 2020 as support for the fact that the rest of the submissions should be included is equally unavailing. (See ECF 24 at 3-4). There, the Commissioners specifically solicited clarification from DRP regarding an issue and included DRP's responsive letter in the record because the Commissioners relied on it in reaching their decision. (ECF 23-1 at 5). This is quite different from the other unsolicited submissions that Plaintiffs seek to include where there is no evidence that the Commissioners relied on them directly or indirectly. Plaintiffs have not put forth any evidence that would lead this Court to

believe that discovery into the administrative process, let alone directly amending the administrative record, would be appropriate in this case.² See NVE, Inc., 436 F.3d at 195 (“In the absence of even a hint of evidence that the FDA failed to follow its own procedures for compiling the record, we will not permit discovery.”)

Where the Court is already faced with a sizeable record and no indication on its face that it is incomplete, the Court will not second guess the administrative record that the Commissioners have already certified. See id. at 196 (noting that the outcome would be different if the record were clearly incomplete on its face and that “the size of the record is certainly a factor that a court should consider in deciding whether to take the unusual step of permitting invasive discovery into administrative decision-making”); U.S. Army Corps of Engineers, 2010 WL 2771771 at *4 (“While the size of the administrative record is not dispositive of whether the agency has produced the complete administrative record, the size of the record is a factor a court may consider when deciding whether to supplement or expand the administrative record designated by the agency.”) After the review of the submitted record, the Court

² To be clear, Plaintiffs do not ask for discovery into whether the administrative record should be amended, but instead, make that application directly.

does not find that it "lack[s] the fundamental documents that would have formed the very basis for the [Commissioners'] decisions[.]" NVE, Inc., 436 F.3d at 195.

Plaintiffs have not put forth a scintilla of evidence of administrative bias or the absence of the factors supporting the Commissioners' decision in the administrative record. See, e.g., Mullica v. Minnesota Life Ins. Co., 2013 WL 5429295, at *3, *5 (E.D. Pa. Sept. 27, 2013) (noting the need for a plaintiff to show bias or some evidence that the full record was not before the court before the court would inquire further). Therefore, Plaintiff's motion to complete the administrative record will be denied.

CONCLUSION

For the reasons expressed above, Plaintiff's motion to correct the administrative record (ECF 19) will be denied.

An appropriate Order will be entered.

Date: December 1, 2021
At Camden, New Jersey

/s Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.